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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS T. MERZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. A, *infra*) is reported at 306 F. 2d 39.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1962 (App. B, *infra*). A timely petition for rehearing *en banc* was denied on September 6, 1962. On December 3, 1962, Mr. Justice White extended the time to file a petition for a writ of certiorari to February 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the report of a commission awarding compensation in a condemnation case tried outside of the presence of the court, which does not show what facts were considered or what law was applied, precludes effective court review and therefore deprives the parties of the right to have just compensation judicially determined.

STATEMENT

This condemnation proceeding was instituted by the United States to obtain clearance easements[1] over several farms in connection with the Clinton-Sherman Air Force Base in Oklahoma. The easements were sloping and their elevation over the various farms ranged from 13 feet to 164 feet. A commission was appointed under Rule 71A(h), F.R. Civ. P., to determine the issue of compensation. The relevant facts may be summarized as follows:

The parties stipulated that the highest and best use of the land was for general agricultural purposes. While each landowner admitted that the easement would not prevent continued use of the land for that purpose, all except one stated that the value of his farm was reduced by one-half. Each also claimed his land had a mineral value which was impaired. Testimony concerning offers to buy was received over government objection.

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[1] Clearance, unlike avigation, easements do not involve flights. Clearance easements place a ceiling over land above which obstructions may not extend. See *United States* v. *Brondum*, 272 F. 2d 642, 643-647 (C.A. 5).

The landowners' valuation totalled $97,000. Their only appraiser-witness, Willcox, based his valuation testimony on the following formula of his own devising (R. 155–157):

$$\frac{\text{surface and building value}}{\text{value of 200' airspace per acre}} \times \text{value of airspace per foot} \times \text{feet affected} \times \text{acreage affected} = \text{amount of surface damage.}^{2}$$

Mineral value, arrived at by the capitalization of assumed bonuses and delay rentals, was then added to the formula-computed surface damage (R. 206). The resulting total was apparently adjusted to reflect the managerial skill of the individual farmer and Willcox testified further that the words "other materials" in the declarations of taking might prevent the use of usual farm machinery. Willcox' valuations totalled $117,927.18.

The government's experts rejected both Willcox' mineral capitalization process and also his surface-damage formula. They testified concerning the effect of these easements, giving valuations, based in part on comparable sales, totalling $16,950 and $18,350.

The commission awarded $49,442 in a report which contained little more than that ultimate conclusion (R. 38). The government objected to the adequacy of the original report, and an additional report was filed after a year's further consideration by the commission. The supplemental report merely recited undisputed facts and concluded with the bare state-

[2] Translated, the formula means that the land is damaged by 1/200 of its value for every foot of airspace taken below 200 feet. Willcox did not consider the airspace above 200 feet to be appreciably valuable for agricultural use.

ment of the rule that the awards should be the difference between the before and after values without, however, stating what those values were (R. 8). Without comment, the commission overruled the government's motion to strike Willcox's testimony.

In the district court and on appeal, the government contended that the reports were inadequate; and that Willcox's testimony, founded on a conjectural formula which was erroneously applied and influenced by the landowners' managerial skill, should have been excluded. The district court adopted the reports without discussion. The court of appeals likewise found the report was adequate for review, although it admitted that only "a general finding as to this amount [the amount of just compensation due] was made" (App. A, *infra*). While holding that the findings were not clearly erroneous, it did not indicate what evidence, whether the landowners' opinion or that of Willcox, justified the awards. It assumed that the commission did not consider the Willcox formula testimony in arriving at its awards (App. A, *infra*). The government's petition for rehearing *en banc*, calling attention to decisions of the Fourth and Ninth Circuits rendered after argument of the present case, was denied without an additional opinion.

REASONS FOR GRANTING THE WRIT

1. The question presented is important. It affects the procedure in thousands of federal condemnation cases in which the prospective awards total many millions of dollars. Trials now pending involve approximately 22,000 tracts, of which almost 5,300 are

in the Tenth Circuit. Unless corrected, the instant decision will govern condemnation proceedings tried by commission in the Tenth Circuit, and may well have an impact elsewhere.

As presented here, the question involves no mere formalistic quarrel. Requiring *some* content in commission reports may well have a substantial effect on the end result. It serves the same purpose as the rule enjoining trial judges to articulate their reasons for judgment in findings of fact and conclusions of law. See F.R. Civ. P., Rule 52(a). The lax procedure endorsed by the decision below, on the other hand, works a denial of due process of law in commission-tried condemnation cases. Failure to require detailed findings and articulated conclusions imposes an impossible burden on the parties and precludes any real review by the district judge, or by the appellate court.[a]

2. The decision below is in conflict with the rule of the Second, Third, Fourth, Fifth, and Ninth Circuits requiring condemnation commissions to file meaningful reports showing the facts found and the law ap-

[a] There is a basis for reviewing jury- and judge-tried condemnation cases. In jury-tried cases, the reviewing court has before it the trial judge's rulings on the issues as they develop in the case and the judge's instructions as the basis for testing the jury's general verdict. In cases tried by a judge without a jury, the reviewing court has findings and rulings. See *McCandless* v. *United States*, 298 U.S. 342, 345–348; *Clay and Quitman Counties* (App. C, *infra*); *United States* v. *Cunningham*, 246 F. 2d 330, 333 (C.A. 4); *Demetria Sifuentes* v. *United States*, 168 F. 2d 264, 266–268 (C.A. 1). Commission-tried cases cannot be effectively reviewed if the report does not show what facts were considered and what law was applied.

plied in reaching an award. *United States* v. *44.00 Acres in the Town of Greece (Odenbach)*, 234 F. 2d 410, 411, 414 (concurring opinion 416) (C.A. 2), certiorari denied, 352 U.S. 916; *United States* v. *Bobinski*, 244 F. 2d 299, 301–302 (C.A. 2); *United States* v. *Certain Parcels in Philadelphia (Merchants Exchange)*, 215 F. 2d 140, 142, 144–146 (C.A. 3); *United States* v. *Cunningham*, 246 F. 2d 330, 333 (C.A. 4); *United States* v. *Carroll*, 304 F. 2d 300, 304–306 (C.A. 4); *United States* v. *2,477.79 Acres in Bell County (Bowles)*, 259 F. 2d 23, 29 (C.A. 5); *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 406–409 (C.A. 5), certiorari denied, 366 U.S. 944; *United States* v. *Lewis*, 308 F. 2d 453, 455–456, 458–460 (C.A. 9); *United States* v. *2,872.88 Acres in Clay and Quitman Counties* (C.A. 5, Nos. 19344 and 19345, Dec. 5, 1962), not yet reported. The conflict is expressly acknowledged by the Court of Appeals for the Fifth Circuit in its *Clay and Quitman Counties* opinion, in which it says: "We recognize that the view we take of this matter is at variance with that of the Court of Appeals for the Tenth Circuit as expressed in the decision of that Court in *United States* v. *Merz*, 10 Cir., 306 F. 2d 39" (App. C, *infra*). We are advised the landowners intend to seek review of that decision on the ground of conflict with the present case.

These decisions cannot be distinguished away. Even if some of the cases involved more complicated facts, as the Tenth Circuit suggests (Appendix A, *infra*, n. 6), others did not. Thus, *Bobinski*, *Carroll*, *Lewis*, and *Clay and Quitman Counties*, all dealt

with ordinary farmland, as here. Nor is the difference between the courts merely one of degree. For, in the instant case, the court below was satisfied with a report which, beyond reciting certain stipulated facts, offered only a single conclusory figure as to each parcel, without the slightest indication what evidence was credited in reaching the result. The conflict between the circuits is plain. It can be resolved only by this Court.

3. The decision below is erroneous. We have already noted that the practice endorsed by the Tenth Circuit renders effective review impossible. When the factfinder reports only an ultimate conclusion without specifying the evidence considered and the weight accorded it, the review and appeal are "empty forms." *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 300, 302–305; *Carter* v. *Kubler*, 320 U.S. 243, 246–247; *United States* v. *Dillman*, 146 F. 2d 572, 574 (C.A. 5), certiorari denied, 325 U.S. 870.[4] The probabilities are that the cursory report filed here hides several errors committed by the commission, which, if brought to light, would require reversal.

Since the commission's estimation of the before and after values is not stated, it is not known whether the

[4] Related to the indispensability of subsidiary findings to the efficacious performance of judicial review in condemnation cases is this Court's insistence on such findings in reviewing decisions of administrative agencies and officers. *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94–95; *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 81; *United States* v. *Drum*, 368 U.S. 370 (concurring opinion 386); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167–169.

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awards are even within the range of the evidence.[5] Nor does the commission show the application of relevant valuation principles. The court of appeals, moreover, assumes that the commission did not rely on Willcox's mathematical formula, even though the commission had refused to strike his testimony.[6] That would leave the landowners' own valuations as the only basis for the award, and as *Clay and Quitman Counties* emphasized, it is important for the reviewing court to know whether the commission "gave credence to the opinions of witnesses who * * * had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case" (App. C, *infra*). The landowners here claimed a diminution in value of one-half, regardless of the varying elevation of the clearance easements above their farms. Did the commission agree? The landowners also admitted that the easements would

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[5] Although the end result, the remainder derived by subtracting "after value" from "before value," may be within the range, there is no way of telling whether the operatives actually used accord with the evidence.

[6] The award of odd-dollar amounts strongly suggests the commission's use of some mathematical process. Whether its process was Willcox's or a quotient-verdict type process or some other, we are not told and cannot know. See *United States v. 4,925 Acres in Grant Parish*, 143 F. 2d 127–128 (C.A. 5). By allowing the commission to remain silent, the court requires the parties, rather than the commission, to do what other courts have refused and, indeed, have found impossible to do on review—namely to demonstrate what did and what did not influence the commission.

not preclude continuation of their particular farming operations. How was this conflict resolved by the commission, if it was? Which view did the commission take, or did it accept both?

These further questions concerning the major conflicts in the evidence and the application of relevant valuation principles are not answered: What value did the commission assign to the mineral estates? If the commission's estimation exceeded the mineral value testimony, that would be plain error. Did the commission consider or use in some form Willcox' mathematical formula in determining just compensation? Reliance on the formula would be clear error, for the ascertainment of value is not a matter of formulas. *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402; *United States* v. *Cors*, 337 U.S. 325, 332; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U.S. 146, 156. Did the commission consider, as Willcox did, the managerial skill of the individuals operating these farms? If it did, that too would be error. Managerial skill is personal and subjective. It is not transferable in the market place and, under federal condemnation law, only objective elements and transferable values may be considered. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326; *United States* v. *Ham*, 187 F. 2d 265, 271 (C.A. 8). Did the commission consider the testimony of offers to buy as indexes of market value? Such testimony is inadmissible and may not be relied upon. *Sharp* v. *United*

States, 191 U.S. 341, 348–350. Was the commission's conclusion as to depreciation in value determined on a percentage basis applicable to all tracts, regardless of the varying heights of the clearance easements? If so, the error is patent.

Also, did the commission rely on any of the testimony relating to comparable sales? Since comparable sales generally furnish the most desirable basis for determining market value, it would be improper for the commission arbitrarily to ignore the evidence of such sales. *United States* v. *Miller*, 317 U.S. 369, 374–375; cf. *United States* v. *2,872.88 Acres in Clay and Quitman Counties* (C.A. 5, Nos. 19344 and 19345, Dec. 5, 1962), not yet reported. Did the commission capitalize assumed oil and gas bonuses and delay rentals? The witnesses disagreed on the propriety of using this method. In this case the method is speculative and, consequently, should not be used. *Olson* v. *United States*, 292 U.S. 246, 257; *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 407 (C.A. 5), certiorari denied, 366 U.S. 944. Did the commission assign any special meaning to the words "other materials" used in the declarations of taking? The commission received conflicting testimony on this point and stated during the hearing that it would "have to make a construction of this, and we have to show in our report how we construed this" (R. 233). The reports, however, are silent as to this, and we are left to speculate whether the commission agreed

with one witness' patently erroneous view that the easements condemned might prevent the use of usual farm machinery.

The court of appeals indicates that if *it* can find some competent evidence in the record to support the commission's result, the parties cannot demonstrate prejudicial error, even though the record contained incompetent evidence, admitted and never rejected by the commission (App. A, *infra*).[7] But it is not the function of the reviewing court to search the record, to analyze the evidence, and to supply findings which the factfinder has failed to make. *Kelley* v. *Everglades District*, 319 U.S. 415, 420–422. And even if that were the proper course, the court of appeals here does not disclose its own analysis. Surely the basis for the determination of just compensation guaranteed to landowners under the Fifth Amendment and the basis for the charge on the public treasury represented by the judgments should be revealed at some stage.

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[7] In fact, most of the condemnation cases which are reversed are reversed for errors of law appearing in the record, even though there is no dispute as to the awards being within the range of the admissible evidence. Cf. *McCandless* v. *United States*, 298 U.S. 342, 347–348; *United States* v. *2,872.88 Acres in Clay and Quitman Counties* (C.A. 5, Nos. 19344 and 19345, Dec. 5, 1962), not yet reported (App. C, *infra*); *United States* v. *Dillman*, 146 F. 2d 572, 573–575 (C.A. 5), certiorari denied, 325 U.S. 870. And in a great many cases the question is whether evidence, admissible for a limited purpose, has been misused. Cf. *United States* v. *Cunningham*, 246 F. 2d 330, 333–334 (C.A. 4).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

FEBRUARY 1963.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 6772, June Term, 1962

Filed, United States Court of Appeals, Tenth Circuit, July 7, 1962

UNITED STATES OF AMERICA, APPELLANT

vs.

LOUIS T. MERZ, LEO J. MERZ, MINARD HENDERSON AND GRACE HENDERSON; W. E. GUTHRIE, BERNICE GUTHRIE AND FEDERAL LAND BANK OF WICHITA, WICHITA, KANSAS; JOHN KERKOFF AND KATHERINE H. KERKOFF; ROBERT E. DAVIS AND MAMIE DAVIS; E. E. SMITH AND PEARL T. SMITH; BERTHA KINNEY ROGERS, JAUNITA KINNEY NAGEL AND WANDA KINNEY RIGGINS; CHARLIE O. RIVERS AND MYRTLE RIVERS, EARL LEVERTON, NETTIE E. BRYAN, L. T. ARMSTRONG, WAYNE ARMSTRONG, MARY INDIANA ARMSTRONG, A/K/A MARY I. ARMSTRONG, A/K/A MRS. T. H. ARMSTRONG, FAY KLIEWER; AND ELLA B. HOOVER AND FEDERAL LAND BANK OF WICHITA, WICHITA, KANSAS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Raymond N. Zagone, Dept. of Justice, Washington, D.C. (Ramsey Clark, Assistant Attorney General, Washington, D.C., B. Andrew Potter, U.S. Attorney, Oklahoma City, Oklahoma, and Roger P. Mar-

quis, Dept. of Justice, Washington, D.C., on the brief), for Appellant.

Denver W. Meacham of the firm of Meacham, Meacham & Meacham, Clinton, Oklahoma, (Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, William J. Holloway, Jr., and Paul R. McDaniel, all of Oklahoma City, Oklahoma, with him on the brief), for Appellees.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

This is a proceeding by the United States to obtain by condemnation clearance easements[1] over neighbor-

[1] The easements taken were described as:

"(1) The continuing perpetual right to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon, extending into, extending above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as described in Schedule '2'.

"(2) The continuing perpetual right to remove, to raze, to destroy, and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above the Glide Angle Plane and/or Transitional Surface as described in Schedule 'Z'.

"(3) The right to ingress to, egress from, and passage on the lands described in Schedule 'A' for the purpose of exercising the rights hereby taken for said public uses. Reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns, all rights, titles, interests and privileges as may be exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses."

Schedule "Z" described runway approach zones extending laterally and longitudinally from the existing runways. The Glide Angle Plane was defined as:

ing lands for use as airplane approaches to Clinton-Sherman Air Force Base in Washita County, Oklahoma. The right to acquire the easements is not disputed. The district court referred the question of adequate compensation to a commission. This is an appeal from a judgment approving and confirming the commission's awards of compensation to be paid to the owners of the tracts of land affected by the taking.

Rule 71A(h), Fed. R. Civ. P., authorizes the district court to appoint a commission of three to determine the issue of compensation to be paid by the United States in land condemnation cases. The commission has the powers of a master as provided for in Rule 53(c), Fed. R. Civ. P., and the proceedings are governed by paragraphs (I) and (II) of subdivision (d) thereof. The report and findings of the commission shall have the effect, and be dealt with by the court in accordance with the practice, set forth in Rule 53(e) (II). United States v. Waymire, 10 Cir., 202 F. 2d 550. The court's order of reference did not require findings of fact and conclusions of law, and it limited the commission's duties to determining the amount of damages to be paid to the landowners.

Just compensation means the full equivalent in money for the property taken. United States v. Miller, 317 U.S. 396. Since the taking of the property by eminent domain is not a voluntary transfer the determination of just compensation is an in-

"The glide angle plane is a trapezoidal plane extending over the runway approach zone starting at an elevation equivalent to the center line elevation at the end of the runway and sloping upward from the narrower end at a rate of 1 foot vertically for each 50 feet horizontally."

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formed guess or estimate based upon the best available criteria of value. Kimball Laundry Co. v. United States, 338 U.S. 1, 7 A.L.R. 2d 1281. Usually it is described as the fair market value of the property when taken. United States v. Silver Queen Mining Co., 10 Cir., 285 F. 2d 506. The determination, however, cannot be reduced to a rigid and fixed rule or formula. United States v. Commodities Trading Corp., 339 U.S. 121; United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396; United States v. Cors, 337 U.S. 325. "The guiding principle . . . is reimbursement to the owner for the property interest taken." United States v. Virginia Electric & Power Co., 365 U.S. 624.

It was stipulated that the highest and best use of the eight tracts of land involved on this appeal was for general agricultural purposes. There was no evidence that the land had any other value except for minerals. The owners of the different tracts testified as to the value of their lands and the amount of damages which the easements caused to them. Appraisers for the United States determined the values, including the mineral values, of the tracts to be substantially less than that fixed by the respective landowners, and their opinions as to damages were comparably smaller. In addition, an appraiser, A. L. Willcox, testified on behalf of the landowners, and, using a formula of his own development, he arrived at an opinion as to the damages to the land by equating the taking of the air space above it to the taking of an undivided portion of the surface.[2] The appli-

[2] The formula used by Willcox assumed that no damage to the surface would result from the taking of air space above an altitude of 200 feet. It also assumed an absolute taking if the air space taken reached ground level. Under the formula damages were computed as ½ of 1% of the value of the

cation of this formula resulted in damages substantially higher than those arrived at by the landowners or the appraisers for the United States.

The commission, after viewing the premises, filed a report which cited the order of reference, and contained ultimate findings as to the amount of compensation to be paid to each landowner. The United States objected to the adequacy of this report, but made no request for specific findings. Thereafter an additional and supplemental report, which included findings of fact, was filed.[3] In objecting to this report, the United States alleged that the commission had failed to make specific findings as to the facts upon which the valuation was based, and further that the report wholly failed to show how conflicting evidence was resolved.[4]

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surface for each foot of the average air space taken below 200 feet. This average was computed as 200 minus one-half of the sum of the altitudes of the Glide Angle Plane as it passed over the opposite boundaries of each tract. He valued the minerals separately, and considered them as taken completely if the average altitude of the Glide Angle Plane was lower than the height of an average oil drilling rig.

[3] This subsequent report made findings as to the height of the clearance easement over each tract, together with a finding that the highest and best use of the land was for agricultural purposes, and concluded that: "The amount of just compensation for each landowner involved is the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking, being the demunition (sic) of said fair cash market value caused solely and directly by the taking; . . ."

[4] A portion of the objections reads:

"2. The Reports wholly fail to make specific findings as to the facts on which the commission based its valuation, and fail to show how they applied applicable principles of law to the facts in reaching their ultimate conclusions.

Relying on United States v. 2,477.79 Acres of Land, 5 Cir., 259 F. 2d 23; United States v. Buhler, 5 Cir., 254 F. 2d 876; and United States v. Cunningham, 4 Cir., 246 F. 2d 330, it contends that the findings are inadequate for a proper review of the proceedings and that the case should be remanded for more adequate findings.

The parties were in agreement as to the type of land over which the easements were taken, and its highest and most profitable use. Generally, the witnesses arrived at their estimates of damages to the land by determining the difference between the market value before the taking of the easement and the market value thereafter. This is the normal method of valuing damages for the taking of an easement by the United States. United States v. Virginia Electric & Power Co., supra. The report of the commissioners shows that its conclusions were arrived at in the same manner. There was a sharp conflict in the evidence as to the amount of these damages. The commissioners' awards are well within the range of this conflicting testimony, and it is settled in this circuit that such findings shall be accepted unless clearly erroneous. Rapid Transit Co. v. United States, 10 Cir., 295 F. 2d 465; Buena Vista Homes,

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"3. The Reports wholly fail to show that all incompetent and inadmissible testimony was disregarded.

"4. The Reports wholly fail to show how controverted testimony was resolved, if it were, in arriving at the valuations, and are therefore deficient and inadequate.

"5. The Reports taken as a whole amount to no more than a general verdict of a jury, since no specific findings of any controverted issues were made, the only specific findings being as to those matters which were stipulated to by the parties to this action. Therefore the Reports are wholly inadequate to furnish an adequate basis for review by the Trial Judge or an Appellate Court."

Inc. v. United States, 10 Cir., 281 F. 2d 476; United States v. Waymire, supra.[5]

"The primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision." Shapiro v. Rubens, 7 Cir., 166 F. 2d 659, 665. See United States v. Tampa Bay Garden Apartments, Inc., 5 Cir., 294 F. 2d 598; United States v. Pendergrast, 4 Cir., 241 F. 2d 687; 5 Moore's Fed. Practice Par. 52.06[1], at 2656 (2d Ed. 1951). The extent of exactness which is required in findings depends upon the nature of the matter involved. Kelley v. Everglades Drainage Dist., 319 U.S. 415. The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made.

We are satisfied that, considering the record as a whole, including all the evidence, our power to review

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[5] In United States v. Waymire, 10 Cir., 202 F. 2d 550, 553–4, the court said:

"Upon review, it was the duty of the court to accept the awards of the commission unless they were clearly erroneous in whole or in part because based upon a substantial error in the proceedings, because based upon a misapplication of the controlling law, because unsupported by substantial evidence, or because contrary to the clear weight of all the evidence. And while it was incumbent upon the court to proceed with due regard for these general principles, if on the whole record the court was clearly convinced that in fixing just compensation for the property taken the commission acted arbitrarily and without proper regard for the evidence, or that the awards were unsupported by any substantial evidence, or that they were against the clear weight of all the evidence, it was the duty of the court to modify them, reject them in whole or in part, receive further evidence, or recommit the matter to the commission with instructions. * * *"

the awards can be properly exercised, and that more specific findings would not be helpful. The situation might be different if there were numerous elements to be considered in arriving at just compensation, as there were in the cases from the Fourth and Fifth Circuits which the United States relies upon.* United States v. Tampa Bay Garden Apartments, Inc., supra. The issues in this case are not complicated, however, and the findings are entirely adequate to permit us

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*In United States v. Cunningham, 4 Cir., 246 F. 2d 330, the land taken was a peninsula approximately 1 mile wide and 4 miles long, containing over 1,850 acres. The property was largely undeveloped but was near a developed beach area and was suitable for development as a beach area for residential and commercial uses. There was testimony as to the value of the ocean front lots. It had value for sport fishing and hunting purposes. The value had been enhanced by the construction of a public highway across the peninsula and the creation of an artificial lake. Evidence of mineral value was offered.

The land involved in United States v. 2,477.79 Acres of Land, 5 Cir., 259 F. 2d 23, was taken in connection with the establishment of a dam and reservoir in the Brazos River Basin in Texas and the expansion of Fort Hood. Prior to the taking, the land was useful for farming and ranching. The building of the reservoir created a water front. One of the principal issues was the added value to the land caused by the creation of the lake. There was also a dispute as to the highest and best use of some of the tract.

In the Buhler case the lands taken involved extensive improvements, including a residence, swimming pools, an airfield with concrete runways, utility systems and 3,500 feet of railroad track. A portion was used as an industrial warehouse area. There was also an area subdivided by paved roadways which was ideally suited for residential development. See United States v. 1,146.32 Acres of Land, S.D. Tex., 20 F.R.D. 21. "The report contains no discussion specifically addressed to that parcel or to the various highest and best uses—airfield, warehouse, subdivision, farming—claimed for it." United States v. Buhler, 5 Cir., 254 F. 2d 876, 882.

to review them and conclude that they are not clearly erroneous.

The United States also asserts error arising out of the failure of the commission to grant its motion to strike the entire testimony of the landowners' expert witness, A. L. Willcox. While other grounds were asserted in its motion the United States now relies on only two of these:

> (1) the consideration by Willcox of the managerial skill of individual landowners in appraising fair market value prior to the taking, and
>
> (2) the impropriety of his testimony as to damages which were computed pursuant to a formula.

Willcox was employed by an insurance company as district manager in charge of making farm and ranch loans in the southwest part of the United States. He had been engaged in similar employment since about 1926, and his duties included making appraisals and determining values of farm and ranch properties. He testified that he had appraised property in Washita County since 1935, and knew its value. He stated that he was familiar with the particular tracts involved in this proceeding and with the easement which the government took, and he fixed the values of the lands prior to the taking. An examination of the testimony concerning managerial skill reveals that Willcox was considering that managerial skill which had contributed to the future profitability of the property. Such evidence was admissible as a factor in determining the value of the property taken by condemnation. Kimball Laundry Co. v. United States, supra.

It may be conceded, arguendo, that the formula utilized by Willcox in appraising the damage to the several tracts resulted in arbitrary damage assessments which were irrelevant in determining fair market

value after the taking. Cf. United States v. Commodities Trading Corp., supra; United States v. Toronto, Hamilton & Buffalo Navigation Co., supra; United States v. Cors, supra. It is apparent from its conclusion that the proper measure of damages was the difference between fair market value prior to the taking and fair market value after the taking, that the commission did not consider the formula testimony in arriving at its awards. United States v. Delaware, L. & W. R.R., 3 Cir., 264 F. 2d 112, cert. denied 361 U.S. 819; United States v. Hirsch, 2d Cir., 206 F. 2d 289. The error, if any, was not prejudicial to the United States.

AFFIRMED.

APPENDIX B

JUDGMENT

Seventeenth Day, June Term, Saturday, July 7th, 1962

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 19344

UNITED STATES OF AMERICA, APPELLANT

versus

2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY AND QUITMAN COUNTIES, STATE OF GEORGIA, AND FRANK HUMBER, ET AL., AND UNKNOWN OWNERS, APPELLEES

and

No. 19345

UNITED STATES OF AMERICA, APPELLANT

versus

1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY COUNTY, STATE OF GEORGIA, AND CAROLYN GAVIN GIBSON, ET AL., AND UNKNOWN OTHERS, APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF GEORGIA

(December 5, 1962)

HUGH NUGENT, Attorney, Department of Justice [with him on the brief were Assistant Attorney General RAMSEY CLARK; United States Attorney FLOYD M. BUFORD; Assistant United States Attorney TRUETT SMITH; and ROGER P. MARQUIS, Attorney, Department of Justice], for appellant.

BENTLEY CHAMPION, of Kelly, Champion & Henson [with him on the brief were STONE & STONE and JESSE G. BOWLES], for appellees.

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and JOHNSON, District Judge.

TUTTLE, Chief Judge: These appeals by the United States from District Court judgments approving valuation awards of condemnation commissioners present the question whether the reports of the commissioners were sufficiently detailed as to findings of fact, and in giving the basis on which they were bottomed to permit adequate review by the district court, and thereafter by this Court.

These condemnation suits are a part of a program of land acquisition for the Walter F. George Lock and Dam project on the Chattahoochee River in Georgia and Alabama. The three series of tracts involved are all tracts of ordinary farm, timber and pasture land. While the government requested a jury trial, it does not now contend that the submission of the issues to commissioners by the trial court constituted reversible error. Neither does the government, on the record before us, assign any specific error in the hearings before the commissioners as a basis for attacking the judgment of the district court in affirming the report of the commissioners. Instead, the government takes the position that the reports of the commissioners are in such general and vague terms as to make it impossible for the district court or for this Court on appeal to determine whether the commissioners' ultimate conclusions of value were based on legally correct principles or on legally sufficient evidence.

The appellees here, first, claim that the Court of Appeals cannot take notice of the government's ap-

peal, because it does not expressly contend that the awards are excessive. They take the position, therefore, that any claim by the government that there was error in the form or substance of the commissioners' reports falls within the "harmless error" rule of the Federal Rules of Civil Procedure, Rule 61 F.R.C.P. We think this contention is without merit. It is apparent from the findings of the commissioners that the awards made by them and approved by the trial court are substantially in excess of the amounts deposited in court upon the declaration of taking. It thus appears that if errors occurred in the proceedings below, as a result of which judgments were awarded in excess of the amounts contended for by the United States, such errors would not be harmless in the sense of the Rule.

In general, the report of the commissioners recited the substance of the valuation testimony given by the several witnesses tendered by the landowners, on the one hand, and by the government on the other, and they made ultimate findings of the market value of the property taken and of severance damages to lands not taken and make certain specific findings as to the value of easements and fences taken, or the cost of fencing the remaining tracts. The reports did not in any manner whatever indicate which evidence the commission credited and which evidence it discredited. The reports gave no indication as to the degree to which it based its findings upon those opinions that were based on knowledge of comparable sales, nor did they give any indication as to whether indicated sales were truly comparable. The reports did not indicate to what extent it gave credence to the opinions of witnesses who, according to the summary of evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally

considered by the courts to be required to support an opinion of value in a condemnation case.

Part of the basis for this Court's repeatedly stating that the trial of condemnation valuation issues is typically for a jury, and the appointment of commissioners is proper only in the exceptional case, *United States* v. *Buhler*, 5 Cir., 254 F. 2d 876, *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 408, *United States* v. *Buhler*, 5 Cir., 305 F. 2d 319, 331, is that where a trial is had before a jury, the trial judge is charged with the responsibility of determining the qualifications of so-called expert witnesses and of others who undertake to express opinions as to land values and to determine initially whether so-called "comparable sales," about which witnesses propose to testify, are sufficiently comparable to justify their consideration by the fact-finder, and because, further, the trial judge is able, by correctly charging the jury, to point out the defects and weaknesses in the testimony of interested parties to the proceedings, such as the owners of the land involved, and to stress the importance, as courts have always done, *Baetjer* v. *United States*, 1 Cir., 143 F. 2d 391, 397; *International Paper Co.* v. *United States*, 5 Cir., 227 F. 2d 201, 208; *United States* v. *Leavell & Ponder, Inc.*, 5 Cir., 286 F. 2d 398, 407, cert. denied 366 U.S. 944, of opinion evidence based on comparable transactions. In a trial to a jury under such supervision by a trial judge, it can well be understood why a general verdict of value, plus a general verdict of severance damages can suffice, whereas a hearing before a commission must result in findings much more detailed than a general verdict.

The Courts of Appeals of the several circuits are not of a uniform mind as to this, but we find ourselves

fully in accord with the reasoning of the Court of Appeals for the Fourth Circuit in *United States* v. *Cunningham*, 4 Cir., 246 F. 2d 330, 333, where it is said:

> The very reasons which justify the appointment of the commission, however, demonstrates the inadequacy of the commission's report. The justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation and the importance of having these adequately set forth in a report so that they may be subjected to the scrutiny of the District Court and of this court upon review and the proper principles of valuation applied to them. Any adequate review of the facts or of the legal principles followed in basing valuations on the facts is defeated if a report by the commission is of such a character that it amounts to no more than a general verdict by a jury. The verdict of a jury of twelve men may reasonably be dispensed with if commissioners make a report which furnishes an adequate basis of review by the trial judge and the appellate court, but not if the report furnishes no such basis. Just as a judge in a trial without a jury is required to make adequate findings so that his conclusions may be reviewed by the appellate court so a master, in an action to be tried without a jury, is required to make findings of fact so that his conclusions may be adequately reviewed by the trial judge, who is required to accept them 'unless clearly erroneous' (Rule 53(e)(2)), and this practice with respect to the report of a master is prescribed by Rule 71A(h) with respect to reports of commissioners in condemnation proceedings.

This Court has expressly approved this language of the Fourth Circuit in *United States* v. *2,477.79*

Acres of Land in Bell County, 5 Cir., 259 F. 2d 23, where on page 29, we said:

> We find ourselves in agreement with the Government's position that the findings of the commissioners are wholly inadequate and that the judgment must be vacated and the cause remanded for proper findings and a judgment based thereon. From the report, so styled, of the commissioners nothing appears except a recital of their appointment, a statement that a hearing was had, and the commissioners' conclusions as to values. As examples of the deficiencies in the findings it may be noted that *nothing is found as to how the commissioners resolved the conflicts in the testimony*, no findings appear as to the uses of the land particularly Tract 805, and no determination is made as to benefits. Without explicit findings the trial court cannot adopt or reject the findings or adopt some and reject others. Without adequate findings this Court does not have before it a record which permits of a review of the district court's adjudication. United States v. Buhler, supra; United States v. Cunningham, 4 Cir., 1957, 246 F. 2d 330. [Emphasis added.]

We recognize that the view we take of this matter is at variance with that of the Court of Appeals for the Tenth Circuit as expressed in the decision of that Court in *United States* v. *Merz*, 10 Cir., 306 F. 2d 39. Our view in this respect is in accord with that of the Court of Appeals for the Ninth Circuit, which has recently reversed judgment of a trial court in California which expressly stated that in a condemnation case, the Commission's finding "may be as general as the verdict of a jury, and have the same effect." In its judgment reversing this decision the Court of Ap-

peals in *United States* v. *Lewis*, 9 Cir., No. 17,437, dec. July 10, F. 2d , said:

> Upon this basic difference we agree with the principles expressed in Cunningham. The district judge is not sitting as the presiding judge in a jury-tried case, but as a reviewing court. He has not heard the evidence nor supervised its admission and thus is in no position to view the commission's report simply as a jury verdict. If the court is intelligently to perform a function of review, it must be able to ascertain whether, in arriving at its value judgment, error was committed by the commission, either in the resolution of factual disputes or in the application of principles of valuation. There must be a sufficient disclosure to the reviewing court to enable it to understand what it is that has been decided. As stated by Mr. Justice Cardozo in United States v. Chicago M., St. P. & P. Railroad, 1935, 294 U.S. 499, 510–511:
>
> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Although admittedly the scope of review, either by the trial court of the commissioner's findings of valuation or by this Court on the trial court's judgment, is restricted in the sense that a reversal is to be had only if the order under review is clearly erroneous, this function cannot be adequately performed by the reviewing court unless the fact finder makes it plain what the basis of its decision was. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based. It is too obvious to require argument that in determining mar-

ket value the best test is what the same or similar property is selling for in the locality at or near the day of taking. Thus, it is universally recognized that the best test of market value is the data concerning comparable sales. On the record before us, the commission speaks of comparable sales, but there is no finding or expression of opinion as to whether the sales sustain a value of $100 per acre, for instance, in the case of one of the tracts, as found by the commission, or whether this value represents merely a scaling down by the commission of an expression of an opinion by others whose opinion of value may have been based on some such theory as that expressed by one of the witnesses, who said:

> I arrived at it like I'd price mine, just like it is; that's what it would take to buy mine adjoining Hoke's.

If this is all that the record shows as to this neighbor's qualifications to express an opinion of value of the land, then such opinion would obviously have no probative value.

This Court has held that in an appeal from a judgment of the trial court where the valuation finding has been made by commissioners, it is the function of the trial court to determine whether the commission's findings are to be approved or are to be reversed under the clearly erroneous standard. *United States* v. *Twin City Power Company of Georgia,* 5 Cir., 253 F. 2d 197, 204. It is then the function of this Court to determine whether the district court's disposition of the commission's findings was clearly erroneous.

In order that the district court may perform its function, it must be able to determine whether the commission adopted the correct legal principles, and

whether the evidence before the commission met the standard of substantiality to withstand a reversal by the district court. As we said in *United States* v. *Leavell & Ponder, Inc.*, 5 Cir. 286 F. 2d 398, at page 406, "The figure arrived at by the commissioners would much better have been supported by subsidiary findings of fact. . . . Without adequate subsidiary findings it is impossible for this Court to test the correctness of the elements of which it is the product or the sum."

Furthermore, while we do not even suggest the need for long findings or long reports merely for the sake of length, there is much to be said for the view that commissioners like trial judges may be expected to give more careful consideration to the subsidiary facts and the legal principles involved if they are required to be stated in the report. The language of the opinion of the Court of Appeals for the Second Circuit, in *United States* v. *Forness*, 2 Cir., 125 F. 2d 928, at page 942 is here apposite:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

In order that the commissioners' reports may meet the standards here prescribed, the judgments are REVERSED and the cases are REMANDED to the trial court for resubmission.

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